Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUMMONS NO S2-22-372 OF 1996
KAMALANATHAN RATNAM J
16 MARCH 1998

Contract *— Misrepresentation — Rescission — Whether puffing or exaggeration in advertising material with object and result of inducing representee to enter into contract is a representation — Omission to check whether contract could be carried out — Whether there was misrepresentation — Contracts Act 1950 s 18(a) &(b)*

Contract *— Exemption clause — Exclusion of representations made in brochure — Representation induced plaintiff to enter into contract — Whether clause attempt to exclude liability that goes to the root of contract — Whether such exemption clause could be relied on*

The defendant was the licence-holder of a golf course which provided golfing facilities at a resort ('the resort'). The plaintiff — lured by the defendant's brochure ('the brochure') which promised various seasports facilities at the resort — signed up for membership at the resort. He was dissatisfied with the facilities provided and was assured that the promised facilities would be provided in the future. The plaintiff then applied for a rescission of the agreement and for a refund of the consideration paid. The defendant relied on an exclusion clause in the brochure and argued that none of the representations made or the brochure amount to a warranty or representation of whatever nature. The General Manager of the defendant stated that at the time the brochure was published the defendant had the intention of providing the promised facilities but since the Port Kelang Authority had refused permission to put up such facilities, the action ought to be dismissed.

Held, allowing the plaintiff's claim:

(1) The plaintiff was motivated by the offer of the seasports facilities as stated in the brochure to enter into the contract (see p 453I).

(2) Usually, mere exaggeration cannot be held as representation. However, where the puffing or exaggeration has both the object and the result of inducing the representee to enter into the contract, the puffing or exaggeration must then form a representation (see p 454C).

(3) The defendant had negligently and without caring for the consequences produced the brochure without checking with the Port Kelang Authority. The General Manager had even admitted that he had a duty to make such enquiries. This was, therefore, a case of misrepresentation under s 18(a) and (b) of the Contracts Act 1950 (see p 454H).

(4) The provision of the seasports facilities was the alluring high point that had induced the plaintiff to enter into the contract. From the outset, there was no way that such a facility could have been provided. Thus, the failure or the inability to provide such a facility must go to the root of the contract. The defendant therefore could not avail itself of the exclusion clause (see p 455D); *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 followed.

[Bahasa Malaysia summary

Defendan merupakan pemegang lesen sebuah padang golf yang menyediakan kemudahan golf di suatu tempat peranginan ('tempat peranginan tersebut'). Plaintif — yang tertarik dengan risalah defendan ('risalah tersebut') yang menjanjikan pelbagai kemudahan sukan laut di tempat peranginan tersebut — telah mendaftar diri untuk keahlian di tempat peranginan tersebut. Ia tidak berpuas hati dengan kemudahan yang disediakan dan diberi jaminan bahawa kemudahan yang dijanjikan akan disediakan di masa depan. Plaintif kemudiannya memohon supaya perjanjian dibatalkan dan agar balasan yang telah dibayar dikembalikan. Defendan bergantung pada fasal ketakmasukan dalam risalah tersebut dan menghujahkan bahawa tidak satu pun daripada representasi yang dibuat dalam risalah tersebut merupakan waranti atau representasi tentang apa-apa pun. Pengurus Besar defendan menyatakan bahawa pada masa risalah diterbitkan, defendan berniat menyediakan kemudahan yang dijanjikan tetapi oleh kerana Pihak Berkuasa Port Kelang telah menolak kebenaran untuk menyediakan kemudahan demikian, tindakan ini patut dibatalkan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Plaintif telah didorong untuk mengikat kontrak oleh tawaran kemudahan sukan laut seperti yang dinyatakan dalam risalah tersebut (lihat ms 453I).

(2) Biasanya, perbuatan membesar-besarkan tidak boleh dianggap sebagai representasi. Namun demikian, di mana pujian yang melambung-lambung atau perbuatan membesar-besarkan mempunyai kedua-dua objek dan keputusan mendorong pihak yang diwakili untuk mengikat kontrak, pujian yang melambung-lambung atau perbuatan membesar-besarkan itu mestilah kemudiannya membentuk representasi (lihat ms 454C).

(3) Defendan telah dengan cuainya dan tanpa mempedulikan akibat-akibat mengeluarkan risalah tersebut tanpa mengesahkannya dengan Pihak Berkuasa Port Kelang. Pengurus Besar juga telah mengakui bahawa ia bertanggungjawab membuat pertanyaan demikian. Maka, ini merupakan suatu kes salah nyata di bawah s 18(a) dan (b) Akta Kontrak 1950 (lihat ms 454H).

(4) Peruntukan kemudahan sukan laut adalah kemuncak tarikan yang telah mendorong plaintif untuk mengikat kontrak. Dari

permulaan, tidak mungkin kemudahan sedemikian boleh disediakan. Justeru itu, kegagalan atau ketidakupayaan untuk menyediakan kemudahan begitu mestilah melibatkan akar umbi kontrak. Maka defendan tidak boleh menggunakan fasal ketakmasukan (lihat ms 455D); *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 diikut.]

Notes

For cases on misrepresentation resulting in rescission of a contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2594–2595 and 2762–2765.

For cases on exemption clause, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2127–2147.

Case referred to

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (folld)

Legislation referred to

Contracts Act 1950 s 18

T Jayadeva (*Lim Eng Keong* with him) (*Syarikat Radhakrishnan*) for the plaintiff.

Shanthi Shunmugam (*Onn Hussein & Yee*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff is a businessman and resides in Petaling Jaya, Selangor. Sometime in March 1991, he read an advertisement in the *New Straits Times* of a resort known as Port Klang Golf Resort ('the resort'). He called at the defendant's office. The defendant is the licence-holder of a golf course which provides golfing facilities at the resort. The plaintiff was handed pamphlets and a brochure extolling the many virtues of the said resort.

The said brochure had, emblazoned on the front inner cover, the following message:

PORT KLANG GOLF RESORT

Port Klang Golf Resort, the first seaside golf resort with seasports facilities in Malaysia, is located next to the nation's premier port, the North Port of Klang. Apart from offering what that is contemporarily available in most of the leading golf clubs, it has been specially designed to include a marina,

floating chalets, apartments, a floating seafood restaurant, an esplanade with a 3-km long jogging track and a wide range of family-oriented activities such as seasports, fishing and island cruises. These fun filled activities are not only for the golfing fraternity but also their families and friends. This is a distinct feature Port Klang Golf Resort has to offer you and your family over any other premier golf clubs in Malaysia.

This prestigious resort not only boasts of a magnificent and beautifully landscaped 18-hole championship golf course, it also provides a complete range of facilities to serve both the golfing and non-golfing members, their families and friends, with on-land and sea activities. What's more, its transferable membership would ensure that your investment grows while you savour the good things in life!

Port Klang Golf Resort's principal objective is to provide an exotic and convenient place for golfers and non-golfers, businessmen, travellers, tourists and all holiday-makers to make the most of their time. And all this amidst the serenity of lush greens and the scenic splendours of the historic Straits of Malacca.

There Has Never Been Any Place Quite Like It!

The said resort boasted, among others, a three-storey golf-resort complex equipped with convention halls, a health centre, sauna, gymnasium, squash courts, snooker and games rooms, a library, pro-shops, boutique, hair saloon and restaurant, floating chalets, a floating seafood restaurant, a marina for yachts and boats and an 18-hole championship golf course.

In an inner page embossed with a picture-print showing sleek white-coloured yachts and boats moored alongside a jetty fringed with coconut palms and shady trees fronting a sea with shimmering waters, the defendant trumpeted:

A FANFARE OF EXCELLENT FACILITIES

One of the most exciting facilities of this resort is the marina. Guests can even sail into Port Klang Golf Resort! The proposed marina has excellent facilities for yachts and boats. It is fully equipped to receive these vessels and guests can even rent boats for fishing, sailing or island cruises. Adjacent to the marina is the sea exhibition and regatta area, designed for sporting, exhibition and social events. In addition to the seasports and other recreational facilities provided by this truly unique resort are a floating seafood restaurant, swimming pool, tennis/squash courts and an esplanade ideal as a jogging track or for a leisurely stroll, just to name a few. Indeed, there has never been any resort quite like this!

Plaintiff's case

The plaintiff's case was that he was lured by the brochure which promised the proposed facilities which he considered unique. He intended to use the said membership to entertain his business clientele since the facilities proposed, promised to be of a high standard. He also intended that his family should enjoy the various facilities promised. He also wished to play golf at the said resort. He then signed a licence agreement on 20 April 1991 with the defendant, whereby he subscribed for 320 'Class B' shares of RM100 each in the defendant. He therefore paid RM32,000 and

acquired a membership of the said resort. He also has to pay RM60 per month for the use of the facilities. On the same day the plaintiff was asked to sign another licence agreement with Rise Park Corp Sdn Bhd ('Rise Park') for the use and enjoyment of the resort facilities. The preamble to the said agreement stated that Rise Park has been assigned the utilisation rights of the resort. The said resort facilities as stated in the annexure to the agreement were for the use of the swimming pool, tennis courts, dining facilities and additional facilities which were never defined. When the plaintiff purchased the said shares, there was only a 9-hole golf course. It has since become an 18-hole golf course. He has only been able to play golf at the resort. However, there is now only a single-storey club house instead of the promised 3-storey club house. There are two tennis courts, a few wooden chalets for overnight guests and a swimming pool.

Being dissatisfied with the facilities provided by the defendant he confronted the General Manager, Jafri Abdullah Tay, who continuously assured him that the said facilities would be provided in the future. He then retained solicitors to send a formal notice. The plaintiff therefore prayed for a rescission of the agreement and for a refund of the sum of RM32,000. Alternatively, he asked for damages and interest at 8% and costs.

Case for the defence

Jafri Tay bin Abdullah, who gave evidence on behalf of the defendant, confirmed that the defendant provided membership for golfing facilities since 1991. The purpose of the brochure he said was to provide information regarding the available golfing facilities or other intended facilities. He relied heavily on an 'exclusion clause' on the last page of the brochure which reads:

IMPORTANT NOTE

> The contents and information contained herein do not constitute or shall be deemed to constitute any warranty or representation of whatsoever nature, whether expressed or implied, on the part of Port Klang Golf Resort Management Sdn Bhd and/or its associates and are subject to changes without notice at the absolute discretion of Port Klang Golf Resort Management Sdn Bhd from time to time.

He then referred to the licence agreement signed between the plaintiff and the defendant which provided only golfing facilities. He confirmed that the defendant's request for approval for floating chalets, a floating restaurant and the marina was refused by the respective authorities. Under cross-examination, the General Manager of the defendant stated that at the time the brochure was published the defendant had the intention of providing these facilities. Since the defendant had been providing the facilities slowly and since in any event the relevant authorities had refused permission to build the marina, he prayed for the action to be dismissed.

Court's findings

Jafri Tay testified that at the time of the publication of the brochure the defendant had not made enquiries from the relevant authorities with

A regard to the provision of the facilities such as the marina, the floating seafood restaurant and floating chalets. He went further to admit that the defendant was not even aware that prior approval was required from the Port Kelang Authority before the construction of the seasports facilities could commence. He frankly admitted that the basis for publicising the various facilities enumerated in the brochure was as 'a promotional item B and to attract buyers'. It is pertinent to record a relevant question and answer arising out of cross-examination:

> Q: Is it not true that the defendant had a duty to make the necessary enquiries with regard to the provision of the facilities before publishing the information in the brochure?
>
> C A: Yes. The first agreement was made between the defendant and PKNS to develop the resort. I owe a duty.

It is surprising that the defendant did not bring in Rise Park as a third party in spite of the assertion in the agreement that there had been an assignment. It is necessary to record verbatim further relevant questions D and answers:

> Q: Is it true to say that the intention of this licence agreement dated 20 April 1991 is for the provision of facilities other than golfing facilities?
>
> A: This licence is only for golfing. The other facilities will be provided at a later stage. As we provide extra facilities you have to pay more.
>
> E Q: Does the defendant still intend to provide any of the facilities mentioned?
>
> A: Yes.

From this, I gather that notwithstanding the agreement signed by the plaintiff with Rise Park, the defendant's evidence shows clearly that it is F the defendant that intends to provide the facilities enumerated in the brochure. But correspondence between the defendant and the Port Kelang Authority clearly shows that no permission would be granted for the proposed seasports facilities on the ground that they would pose a danger to shipping in that area.

G *Was plaintiff induced to sign the agreement?*

Where the defendant has made a false representation to the plaintiff which had the object and result of inducing the plaintiff to enter into the licence agreement dated 20 April 1991, the plaintiff may in my judgment elect to regard the contract as rescinded. Whilst I accept the fact that a H representation must be distinguished from a mere statement, yet where a statement is presented in such a way as to represent a fact which would induce the representee to enter into the contract then it is my duty to hold that such a statement was intended to have contractual force and is thus a contractual term.

I Here it is clear from the unchallenged evidence of the plaintiff that he was motivated by the offer of the seasports facilities as stated in the brochure to have entered into the contract. It was an unique proposition, so far as he was concerned. Although the statements made in the brochure are now said to be intended for the future, yet it is clear that such a

statement of intention involves a representation as to the existence of the intention which is itself a present fact. In any case, even such a fact cannot be true because if the defendant had only enquired from the Port Kelang Authority before publicising the brochure, the defendant could have ascertained that any such representation with regard to the provision of the seasports facilities, cannot be true.

Is the brochure a mere puffing?

At times mere exaggeration cannot be held as representation. A mere puffing and gloating of one's own goods and of its high esteem ought to be taken with the proverbial 'pinch of salt'. However, where the puffing or exaggeration has both the object and the result of inducing the representee to enter into the contract, the puffing or exaggeration must then form a representation. In this case, the inner page to the brochure describes the resort as 'the first seaside golf resort *with seasports facilities in Malaysia*' (emphasis added) and further in the brochure, it states 'one of the most exciting facilities of this resort is the marina'. There is no doubt in my mind that, as admitted by the General Manager, the object of these statements were to attract buyers and indeed the plaintiff was a victim of this attraction.

Section 18 of the Contracts Act 1950

The said section reads:

> Misrepresentation
>
> 'Misrepresentation' includes —
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

It is obvious that the defendant had negligently and without caring for the consequences produced the said brochure without checking with the Port Kelang Authority. In fact, the defendant even admitted that it didn't know it had to make prior enquiries from the Port Kelang Authority. In any case the General Manager admitted he had a duty to make such enquiries. I cannot see a clearer case where the provision of s 18(a) and (b) of the Act would apply.

The effect of the 'exclusion clause'

The defendant relies heavily on this clause to argue that none of the representations made or the brochure amount to a warranty or

representation of whatever nature. A question I have to consider is whether the statement which the defendant considers to be the exclusion clause, is indeed an exclusion clause. Since I have held that the terms contained in the brochure have contractual force, in effect therefore this is an exclusion clause. I now have to consider the effect of this exclusion clause. In *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, the Court of Appeal held that where a term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. It further held that if the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach are not serious, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

Coming to the case at hand, I have no hesitation that the provision of the seasports facilities was the alluring high point that had induced the plaintiff to enter into this contract and since from the outset, there was no way that such a facility could have been provided due to the fact that the Port Kelang Authority had subsequently refused such permission, the failure or the inability to provide such a facility must go to the root of the contract. The defendant therefore cannot avail itself of this exclusion clause.

In the circumstances, it is my judgment that the plaintiff is entitled to an order for rescission and for a refund of the sum of RM32,000 and costs. There shall be no order for interest on the said sum since the plaintiff had been using the golfing facilities in any case.

Claim allowed.

Reported by Loo Lai Mee